

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CYNTHIA L.,

Plaintiff,

v.

Civil Action No.
3:20-CV-0617 (DEP)

KILOLO KIJAKAZI, Acting Commissioner
of Social Security,¹

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LACKMAN GORTON LAW FIRM
P.O. Box 89
1500 East Main St.
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PETER A. GORTON, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
625 JFK Building
15 New Sudbury St
Boston, MA 02203

HEATHER M. LaCOUNT, ESQ.

¹ Plaintiff's complaint named Andrew M. Saul, in his official capacity as the Commissioner of Social Security, as the defendant. On July 12, 2021, Kilolo Kijakazi took office as the Acting Social Security Commissioner. She has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. See 42 U.S.C. § 405(g).

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.² Oral argument was heard in connection with those motions on September 22, 2021, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court’s oral bench

² This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

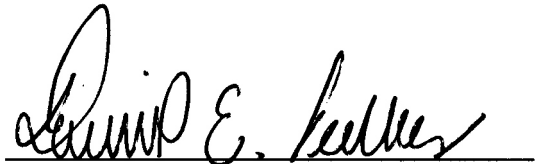
decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

1) Defendant's motion for judgment on the pleadings is GRANTED.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", is written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: September 29, 2021
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
CYNTHIA L.,

Plaintiff,

vs.

3:20-CV-617

KILOLO KIJAKAZI, Acting
Commissioner of Social Security,

Defendant.

-----x
DECISION - September 22, 2021

the HONORABLE DAVID E. PEEBLES

United States Magistrate-Judge, Presiding

APPEARANCES (by telephone)

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Attorneys at Law
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BY: PETER A. GORTON, ESQ.

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1 THE COURT: Let me begin by thanking counsel for
2 excellent, as usual, presentations, and it was very
3 informative, both the briefs and the oral arguments.

4 Plaintiff has commenced this proceeding pursuant to
5 42, United States Code, Sections 405(g) and 1383(c)(3) to
6 challenge a determination by the Acting Commissioner of
7 Social Security concluding that plaintiff was not disabled at
8 the relevant times and, therefore, is ineligible for the
9 benefits that she sought. The background is as follows.

10 Plaintiff was born in February of 1974. She is
11 currently 47 years of age. Plaintiff was 42 years old at the
12 time of the alleged onset of disability on December 15, 2016.
13 Plaintiff stands approximately 5-foot 2-inches in height, and
14 has weighed at various times approximately 224 to 235 pounds.

15 Plaintiff has a GED. While in school she attended
16 regular classes. She also has an EMS certification, and took
17 some college classes aiming to be a medical assistant. That
18 appears at page 283 of the Administrative Transcript.

19 Plaintiff lives in Port Crane, New York. It's
20 unclear whether she still lives with her husband; there is an
21 indication they were separated in March of 2017. That
22 appears at 592 of the Administrative Transcript. She also
23 has a son age 20, and the son's girlfriend lives with her as
24 well as the son. The girlfriend is 19 years old.

25 Plaintiff is left-handed. Plaintiff drives but on

1 a limited basis; she does not drive at night and she always
2 has someone with her in the event that she experiences an
3 episode.

4 Plaintiff stopped working in January of 2017. She
5 worked as a volunteer bookkeeper in December of 2017 for a
6 family friend. She also worked in April and May of 2018 part
7 time driving a box truck and in an office setting. Plaintiff
8 in the past has also worked as a customer service
9 representative in the cable business, a home health aide, a
10 gas station and grocery store cashier and customer service, a
11 recycle center clerk, a bus driver, a school bus driver, a
12 nursing home aide, a phlebotomist, and a tax preparer. The
13 latter one was seasonal and some of those positions were part
14 time, others full time.

15 Physically, plaintiff suffers from fibromyalgia, at
16 least it has been diagnosed as such, although the
17 Administrative Law Judge noted that the diagnosis was not
18 supported by the requisite findings under the Commissioner's
19 regulations and ruling concerning fibromyalgia. She suffers
20 from back and hip pain, vestibular disorder with migraine
21 headaches, which were described as cluster headaches, which
22 she experiences two to seven times a week. She also suffers
23 from Mal de Debarquement Syndrome, which I understand from
24 one source is a rare and poorly understood disorder of the
25 vestibular system that results in phantom perception of

1 self-motion typically described as rocking, bobbing or
2 swaying. That source indicates that the symptoms tend to be
3 exacerbated when a patient is not moving, for example, when
4 sleeping or standing still. The primary symptom of I'm going
5 to call it MDD is the persistence of a sense of motion and
6 rocking. It is noted that some MDD patients may experience
7 fatigue, mood changes and confusion. It is also noted that
8 imbalance is a common complaint. The plaintiff also suffers
9 from mild carpal tunnel syndrome, obesity, high blood
10 pressure, and hyperlipidemia.

11 Mentally, plaintiff experiences anxiety and
12 depression. She has undergone regular counseling for her
13 condition and is prescribed medication. She does not see a
14 psychiatrist, however. She was hospitalized, according to
15 her, for three days for depression in 2013. There are no
16 records of that hospitalization contained in the
17 Administrative Transcript.

18 Plaintiff has seen Dr. Amhed Alwan, a neurologist,
19 since October of 2016; and Dr. Joy Burke, a neurologist,
20 since December of 2018. Her primary care provider is
21 Physician Assistant Thomas Jones, who she has seen at least
22 since January 2016.

23 Plaintiff has been prescribed various medications
24 including Inderal; Lexapro for her depression; Meclizine;
25 Zebeta; Amitriptyline; Cymbalta; Topamax; Zoloft; Valium;

1 Motrin 800 milligrams. She has also tried Imitrex and
2 Fioricet.

3 In terms of activities of daily living, plaintiff
4 can cook, do dishes, clean, shop, does some driving as
5 indicated previously. She can shower with help getting in
6 and out of the tub. She dresses. Her son does the laundry
7 for her. She likes to crochet. She goes to bingo. She
8 engages in child care. She has a one-year-old foster child.
9 It's unclear whether that still exists and for how long it
10 did. She reads, watches television, goes out to dinner,
11 cares for her pets. She can swim. She attended a
12 recreational vehicle show. Plaintiff is a former smoker, but
13 according to the record, quit several years ago.

14 Procedurally, plaintiff applied for Title II and
15 Title XVI benefits under the Act on January 11, 2017. The
16 Commissioner notes that this was the seventh such
17 application, and that appears to be true from 254 to 255 of
18 the Administrative Transcript.

19 Plaintiff alleged an onset date of December 15,
20 2016, and at 283 claims disability based on vertigo,
21 fibromyalgia, anxiety, depression and palpitations. A
22 hearing was conducted by Administrative Law Judge Paul D.
23 Barker, Jr. on February 22, 2019, to address plaintiff's
24 application for benefits. On April 8, 2019, the
25 Administrative Law Judge issued an unfavorable decision,

1 which became a final determination of the Agency on April 7,
2 2020, when the Social Security Administration Appeals Council
3 denied plaintiff's request for review. In doing so, it
4 rejected a medical source statement from Dr. Joy Burke dated
5 June 13, 2019, stating that it did not relate to the period
6 at issue. That appears at page 2 of the Administrative
7 Transcript. This action was commenced on June 3, 2020 and is
8 timely. In his decision, ALJ Barker applied the familiar
9 five-step sequential test for determining disability.

10 He first noted that plaintiff was last insured on
11 December 31, 2020. He then concluded that while plaintiff
12 had engaged in additional work since that date, she had not
13 engaged in anything that would be considered substantial
14 gainful activity, or SGA, since December 15, 2016.

15 At step two, the ALJ concluded that plaintiff
16 suffers from severe impairments that impose more than minimal
17 limitations on her ability to perform work-related functions,
18 including vestibular disorder with migraine headaches, MDD
19 Syndrome, anxiety disorder, and depression. And when I say
20 MDD, it's not major depressive disorder, in this case it's
21 Mal de Debarquement Syndrome.

22 In doing so, the Administrative Law Judge rejected
23 other conditions as nothing severe enough to meet the
24 regulations, including obesity; carpal tunnel syndrome; right
25 cubital tunnel syndrome; high blood pressure; hyperlipidemia;

1 and fibromyalgia, which was rejected, as I indicated
2 previously, under SSR 12-2p. He did note, however, that he
3 has considered the reported symptoms underlying the
4 fibromyalgia diagnosis.

5 At step three, Administrative Law Judge Barker
6 concluded that plaintiff's condition does not meet or
7 medically equal any of the listed presumptively disabling
8 conditions, specifically considering listings 2.07 related to
9 vestibular impairments, 11.00 and 11.02 related to migraines,
10 and 12.04 and 12.06 related to plaintiff's mental conditions.

11 The Administrative Law Judge next concluded that
12 plaintiff retains the residual functional capacity, or RFC,
13 notwithstanding her impairments to perform sedentary work
14 with additional limitations both addressing her physical
15 impairments and also her mental impairments.

16 With regard to the latter, the RFC provides that
17 plaintiff can understand, remember, and carry out simple
18 tasks but not at an assembly line rate. She must not operate
19 motor vehicles and must never be exposed to unprotected
20 heights or moving unprotected machinery.

21 Applying that residual functional capacity at step
22 four, Administrative Law Judge Barker concluded that
23 plaintiff is incapable of performing her past relevant work.
24 Based on the testimony of a vocational expert, he detailed
25 all of the positions that plaintiff previously held.

1 At step five, the Administrative Law Judge first
2 concluded that if plaintiff was capable of performing a full
3 range of sedentary work, a finding of no disability would be
4 directed by the Medical-Vocational Guidelines, or the Grids,
5 and specifically Grid Rules 201.28 and 201.21. Based on the
6 testimony of the vocational expert who was presented with the
7 hypothetical that paralleled the residual functional
8 capacity finding, the vocational expert opined and the ALJ
9 found that plaintiff could perform available work in the
10 national economy, citing representative jobs, including a
11 document addresser, a call-out operator, and a surveillance
12 system monitor.

13 The Court's function in this case, as you know, is
14 extremely limited and the standard which I apply is very
15 deferential. In *Brault versus Social Security Commissioner*,
16 683 F.3d 443 (2012), the Second Circuit noted that it is
17 extremely deferential, more so than the clearly erroneous
18 standard that we as lawyers understand. In *Brault* the
19 Circuit made the observation that under this standard when a
20 fact is found by the Agency, it can be rejected only if a
21 reasonable factfinder would have to conclude otherwise.

22 And, of course, the standard which I apply is that,
23 A, correct legal principles must be applied, and B, the
24 resulting determination must be supported by substantial
25 evidence, defined as such relevant evidence as a reasonable

1 mind would find sufficient to support a conclusion.

2 In this case, plaintiff raises several contentions.
3 First, she challenges the refusal of the Appeals Council to
4 consider Dr. Burke's medical source statement. Secondly, she
5 claims that the residual functional capacity finding does not
6 account for her limitations in work pace and attendance, and
7 that in finding to the contrary of the medical opinions, the
8 Administrative Law Judge substituted his lay opinion for
9 uncontested medical opinions and improperly interpreted their
10 medical evidence. The third point is that there was improper
11 weight given to various medical opinions in the record,
12 including from Dr. Burke, Dr. Alwan, Physician Assistant
13 Jones, Dr. Jenouri, Dr. Slowik and Dr. Harding. Fourth, the
14 plaintiff cites improper reliance on activities of daily
15 living and work attempts. And fifth, argues that the RFC
16 does not accommodate plaintiff's propensity to dizziness.

17 First addressing the Appeals Council's decision
18 with regard to the medical source statement from Dr. Joy
19 Burke, that statement was given on June 13, 2019, shortly
20 after the Administrative Law Judge's decision in this case.
21 It is new evidence. Under the regulations, and specifically
22 20 CFR Section 404.970(a)(5), to be considered evidence must
23 be material and new, must relate to the period on or before
24 the date of the Administrative Law Judge's decision, and
25 plaintiff must show a reasonable probability that the new

1 evidence would change the outcome. And when I give citations
2 to the part 404, I will just note that there are parallel
3 provisions in the section governing the Title XVI claim, but
4 I won't give you both cites.

5 The Appeals Council opinion is at page 2 of the
6 Administrative Transcript. And essentially -- not
7 essentially, verbatim, states as follows: "You submitted
8 medical evidence from Dr. Joy Burke dated June 13, 2019 (3
9 pages). The Administrative Law Judge decided your case
10 through April 8, 2018. This additional evidence does not
11 relate to the period at issue. Therefore, it does not affect
12 the decision about whether you were disabled beginning on or
13 before April 8, 2019." Clearly, as I think the Commissioner
14 might concede, that is factually incorrect. It's not
15 specifically stated in Dr. Burke's opinion what period it
16 relates to, but it by definition must relate to the period
17 prior to the ALJ's decision.

18 The larger question then is whether that error is
19 harmless or harmful. In addressing that I focus on prong
20 three of the relevant test, whether there is a reasonable
21 probability that new evidence would change the outcome, and I
22 believe the answer is no. Clearly Dr. Burke is a treating
23 source but her opinion is a check-box form, which the
24 Commissioner has argued is traditionally viewed as very weak
25 evidence. There is really no discussion to support the

1 conclusions reached by Dr. Burke, and her conclusions are
2 consistent with those offered by Physician's Assistant Thomas
3 Jones, which were rejected by the ALJ. The ALJ did consider
4 Dr. Burke's records and relied on Dr. Jenouri and
5 Dr. Harding. I find, therefore, that while there was error,
6 it is not harmful error.

7 The second argument raised in connection with the
8 Social Security Appeals Council by the plaintiff is whether
9 there was an obligation for the Appeals Council to apply the
10 treating source rule and explain why Dr. Burke's opinion is
11 not being given controlling weight or explained what weight
12 was given, if any. I had the same argument before me in
13 *Jessica W. versus Saul*, 2021 WL 797069, from March of this
14 year, 2021. In that case I acknowledged the many cases that
15 require the Appeals Council even when it denies review to
16 apply the treating source rule and explain why I believe
17 those were misguided. There was no appeal in the *Jessica W.*
18 case. It is unfortunate, but given the circumstances, the
19 Commissioner limited appeals and plaintiff didn't appeal my
20 ruling, probably for good reasons.

21 So I'm not sure we'll get any guidance from the
22 Circuit on that question any time soon, but in any event, I'm
23 going to follow *Jessica W.* and say, and for the reasons
24 stated therein, the Appeals Council review does not have
25 obligation to apply the treating source rule to

1 after-acquired or after-submitted medical evidence from the
2 treating source.

3 Turning to the weight of the medical evidence and
4 focus, of course, on work pace and attendance. This relates,
5 of course, to the residual functional capacity finding, or
6 RFC, represents a finding for the range of tasks a plaintiff
7 is capable of performing notwithstanding her impairments.
8 Ordinarily an RFC represents the claimant's maximum ability
9 to perform sustained work activities in an ordinary setting
10 on a regular and continuing basis, meaning eight hours a day
11 for five days a week, or an equivalent schedule. Of course,
12 an RFC determination is informed by consideration of all of
13 the relevant medical and other evidence and must be supported
14 by substantial evidence.

15 In this case there are two opinions given by
16 Dr. Burke, who I believe is properly regarded as a treating
17 source. On December 18, 2015, Dr. Burke stated, "I think
18 she," meaning the plaintiff, "is able to return to work,
19 sedentary job would be best, and perhaps with flexible hours
20 or working from home ideally." That appears at 604 and I
21 think it also appears at 822 of the Administrative
22 Transcript.

23 That opinion partially supports the residual
24 functional capacity finding. It certainly doesn't state that
25 it is medically necessary that the plaintiff would have

1 flexible hours and/or work from home. The more difficult
2 question concerns, and the Administrative Law Judge discussed
3 this on page 22 and 23, and found that it generally supports
4 the conclusion that the plaintiff could sustain full-time
5 employment at the sedentary exertional level.

6 The second opinion given by Dr. Burke, as I
7 previously indicated, came on June 13, 2019. It appears at
8 pages 36 and 37 of the Administrative Transcript. It is a
9 check-box form. It contends the plaintiff would be off task
10 more than 33 percent of the day and absent more than four
11 days a month.

12 Dr. Burke, of course, is a treating source. This
13 case is governed by the former regulations. Under those
14 regulations the treating physician's opinion regarding the
15 nature and severity of an impairment is entitled to
16 considerable deference provided it is supported by medically
17 acceptable clinical and laboratory diagnostic techniques and
18 is not inconsistent with other substantial evidence. The
19 treating source opinion is not controlling, however, if it is
20 contrary to other substantial evidence in the record,
21 including the opinions of other medical experts.

22 And, of course, where there are conflicts in the
23 form of contradictory medical evidence, the resolution is
24 properly entrusted to the Commissioner. *Veino verses*
25 *Barnhart*, 312 F.3d 578, 588 (2d Cir. 2002). Dr. Burke's

1 opinion, of course, as I indicated, it came after the
2 Administrative Law Judge's decision. It was not addressed,
3 therefore, in the ALJ's decision. And I've already concluded
4 that it is weak evidence and would likely not change the
5 outcome in this case.

6 The second medical opinion of record comes from
7 Dr. Alwan, and that is from January 2, 2019, at pages 334 and
8 335 of the Administrative Transcript. Again, a check-box
9 form, finding that plaintiff would be off task more than 10
10 but less than 15 percent, and absent two days per month.
11 That was discussed at page 23 of the Administrative Law
12 Judge's decision. The opinion was given limited weight. The
13 reasons cited were, one, the neurology records do not
14 indicate she had any significant attention or concentration
15 issues; two, she reported notable improvement in dizziness
16 and migraine symptoms at her neurology visits with some
17 medication adjustments and vestibular therapy; and third,
18 although she reported she could not sustain part-time work,
19 she also reported caring for a one-month-old baby. Being a
20 check-box form, this is entitled to very little weight.

21 The Administrative Law Judge did recognize
22 Dr. Alwan as a neurologist and explained the weight being
23 given. I believe the explanation is proper and no reasonable
24 factfinder -- I cannot say a reasonable factfinder would have
25 to credit Dr. Alwan's opinions.

1 The third opinion is given by the Physician
2 Assistant Thomas Jones from March 22, 2019. It appears at
3 883 and 844 of the record, check-box form. Plaintiff would
4 be, according to Physician Assistant Jones, off task more
5 than 33 percent of the day and absent more than four days per
6 month. Again, check-box form, weak. It is discussed at
7 page 23 of the Administrative Law Judge's decision. First of
8 all, as a Physician's Assistant, Mr. Jones' opinions are not
9 entitled to controlling weight as he is not an acceptable --
10 under the former regulations not an acceptable medical
11 source. The reasons cited are explained in the second full
12 paragraph at page 23, and I'm unable to conclude that a
13 reasonable factfinder would have to credit PA Jones'
14 opinions.

15 Next opinion in the record is from Examining
16 Physician Dr. Gilbert Jenouri from March 16, 2017. It
17 appears at 583 through 586 of the Administrative Transcript.
18 In his opinion Dr. Jenouri concluded that plaintiff has mild
19 to moderate restriction with walking, standing long periods,
20 bending and stair climbing. Also the claimant is restricted
21 from driving and operating heavy machinery. This is
22 consistent with the RFC finding. Dr. Jenouri's opinion is
23 discussed at page 22 of the Administrative Transcript and
24 given significant weight. Dr. Jenouri did not opine one way
25 or the other on the question of off task or absence.

1 The next opinion of record is Dr. Amanda Slowik, an
2 examining psychologist. It's from March, 16, 2017. It
3 appears at 589 to 593 of the Administrative Transcript. In
4 the medical source statement, significantly Dr. Slowik
5 concludes that the claimant's ability to sustain an ordinary
6 routine is moderately to markedly limited. That's at
7 page 592. Dr. Slowik's opinion is discussed at page 23 of
8 the Administrative Law Judge's decision. The opinion is
9 given partial weight based on the fact that according to the
10 ALJ, the examination and other evidence do not support more
11 than moderate limitations in any area of medical functioning.
12 He cites claimant's ability to attend medical appointments
13 and therapy, perform household chores, drive at times, care
14 for children, perform some work activity, and foster a
15 one-month-old baby. Again, I think this is an appropriate
16 explanation and I am not able to say that a reasonable
17 factfinder would have to conclude otherwise.

18 The last opinion comes from Dr. T. Harding, a state
19 agency consultant who did not examine the plaintiff but did
20 review records that were available at the time. It was given
21 on March 28, 2017 by Dr. T. Harding, and it appears at 2A and
22 4A of the Administrative Transcript. The mental health
23 residual functional capacity concludes by stating, "Based on
24 the objective evidence, the claimant retains the ability to
25 perform the four basic demands of unskilled work on a

1 sustained basis and disability is therefore denied." That's
2 at page 115.

3 In the worksheet, which of course under the POMS is
4 not necessarily controlling, Dr. Harding concluded that
5 plaintiff is moderately limited in the ability to perform
6 activities within a schedule, maintain regular attendance,
7 and be punctual within customary tolerances. That's at
8 page 114. I believe the discussion of Dr. Harding's opinion,
9 which appears at page 24, where he gives the opinion
10 significant weight, is proper. I would have liked to have
11 seen a little more fulsome discussion but, nonetheless, I
12 believe that it generally supports and provides substantial
13 evidence necessary to support the residual functional
14 capacity finding.

15 As I reiterate, it is for the Administrative Law
16 Judge to weigh conflicting opinions under *Veino*. And I also
17 note, as the Commissioner correctly argues, the RFC doesn't
18 exactly coincide with any one medical opinion, but that is
19 not a basis to conclude that is erroneous, under *Matta versus*
20 *Astrue*, 508 Fed. Appx. 53, 56 (2d Cir. 2013.)

21 I don't believe that the conclusion that plaintiff
22 cannot sustain work being on task and not absent more than
23 one time per week is uncontradicted. If it is
24 uncontradicted, I appreciate the Commissioner's invitation
25 for me to explain for the Second Circuit why they're wrong;

1 however, since the Second Circuit appears to continue to
2 apply the overwhelmingly compelling standard, I am going to
3 defer and decline, respectfully, the invitation by the
4 Commissioner to educate the Circuit.

5 But I find that even if, even if the opinions
6 regarding absenteeism and off task, off-task-ness, if that's
7 a word, are uncontradicted, I find that the explanation given
8 is overwhelmingly compelling for discounting those opinions.

9 So, in conclusion, I find that correct legal
10 principles were applied, substantial evidence supports the
11 Administrative Law Judge's decision. I will grant judgment
12 on the pleadings to the defendant and will order dismissal of
13 plaintiff's complaint.

14 Thank you both. Have a good afternoon.

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C E R T I F I C A T I O N

I, EILEEN MCDONOUGH, RPR, CRR, Federal Official
Realtime Court Reporter, in and for the United States
District Court for the Northern District of New York,
do hereby certify that pursuant to Section 753, Title 28,
United States Code, that the foregoing is a true and correct
transcript of the stenographically reported proceedings held
in the above-entitled matter and that the transcript page
format is in conformance with the regulations of the
Judicial Conference of the United States.



EILEEN MCDONOUGH, RPR, CRR
Federal Official Court Reporter